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No. 98-564

In the Supreme Court of the United States

OCTOBER TERM, 1998

WILLIAM JEFFERSON CLINTON, *et al.*,
Appellants,

v.

MATTHEW GLAVIN, *et al.*,
Appellees.

On Appeal from the United States District Court for the Eastern District of Virginia

BRIEF FOR APPELLEES NATIONAL KOREAN AMERICAN SERVICE & EDUCATION CONSORTIUM, INC., *et al.* IN SUPPORT OF APPELLANTS

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QUESTIONS PRESENTED

1. Whether the Census Act, 13 U.S.C. § 1 *et seq.* (1994 & Supp. II 1996), prohibits the Secretary of Commerce from employing statistical sampling in the 2000 census in determining the population for the purpose of apportioning Representatives among the states.

2. Whether Article I, Section 2, Clause 3 of the Constitution prohibits the use of statistical sampling in determining the population for the purpose of apportioning Representatives among the states.

PARTIES TO THE PROCEEDINGS

William Jefferson Clinton, President of the United States; the United States Department of Commerce; William M. Daley, Secretary of the United States Department of Commerce; the Bureau of the Census; and James F. Holmes, Acting Director of the Bureau of the Census, are appellants in this case and were defendants below;

Matthew Glavin; Robert Barr, individually and in his capacity as a member of the United States House of Representatives; Gary A. Hofmeister; Stephen Gons; James F. McLaughlin; David H. Glavin; John Taylor; Deborah Hardman; Craig Martin; Jim Lacy; Judy Cresanta; Helen V. England; Amie S. Carter; Robert Richard Dennik; Michael T. James; William J. Byrn, individually and in his official capacity as Cobb County Commission Chairman; and Cobb County, Georgia are appellees in this case and was the plaintiff below;

National Korean American Service & Education Consortium, Inc.; Organization of Chinese Americans, Inc.; Organization of Chinese Americans, Los Angeles, California Chapter; Search to Involve Pilipino Americans, Inc.; United Cambodian Community, Inc.; League of United Latin American Citizens; California League of United Latin American Citizens; National Association of Latino Elected and Appointed Officials, Inc.; Mothers of East Los Angeles; Hee-Sook Kim, a resident of New York; Adeline M.L. Yoong, a resident of California; Michael Balaoing, a resident of California; Sovann Tith, a resident of California; Johnny Rodriguez, a resident of Texas; Chayo Zaldivar, a resident of Texas; Gilberto Flores, a resident of California; and Alvin Parra, a resident of California; and

Richard A. Gephardt; Danny K. Davis; Juanita Millender-McDonald; Lucille Roybal-Allard; Louise M.

Slaughter; Bennie G. Thompson, individually and in their capacities as members of the United States House of Representatives; and

Legislature of the State of California; The California Senate; John Burton, individually and as President Pro Tempore of the California Senate; Antonio Villaraigosa, individually and as Speaker of the California Assembly; and

City of Los Angeles, California; City of New York, New York; County of Los Angeles, California; City of Chicago, Illinois; City and County of San Francisco, California; Miami-Dade County, Florida; City of Inglewood, California; City of Houston, Texas; City of San Antonio, Texas; City and County of Denver, Colorado; City of Long Beach, California; City of San Jose, California; City of Stamford, Connecticut; City of Oakland, California; City of Cudahy, California; County of Santa Clara, California; County of San Bernardino, California; County Of Alameda, California; County of Riverside, California; State of New Mexico; City of Detroit, Michigan; City of Bell, California; City of Gardena, California; City of Huntington Park, California; U.S. Conference of Mayors; League of Women Voters of Los Angeles; and Carolyn Maloney, Christopher Shays, Tom Sawyer, Rod Blagojevich, Bobby Rush, Luis Guitierrez, John Conyers, Jose Serrano, Cynthia McKinney, Charles Rangel, Donald Payne, Howard Berman, Xavier Beccera, Loretta Sanchez, Julian Dixon, Henry Waxman, Maxine Waters, Esteban Torres, Sheila Jackson Lee, Robert Menendez, Ed Pastor, Silvestre Reyes, Ciro Rodriguez, Carlos Romero-Barcelo, individually and in their capacities as members of the United States House of Representatives; State of Texas;

are appellees in this case and were intervenor-defendants below.

RULE 29.6 LISTING

Organization of Chinese Americans, Inc. is the corporate parent of Organization of Chinese Americans, Los Angeles, California Chapter. Other appellee corporations associated in this action with National Korean Service & Education Consortium, Inc. have neither corporate parents nor subsidiaries required to be listed pursuant to Sup. Ct. R. 29.6.

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On Appeal from the United States District Court for the Eastern District of Virginia

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BRIEF FOR APPELLEES NATIONAL KOREAN AMERICAN SERVICE & EDUCATION CONSORTIUM, INC., *et al.* IN SUPPORT OF APPELLANTS

OPINION BELOW

The opinion of the district court, *J.S.* 1a-23a, is not yet reported.[1]

JURISDICTION

The opinion and order of the district court, *J.S.* 1a-23a, were entered on September 24, 1998. Appellants filed their notice of appeal, *J.S.* 37a-39a, on September 25, 1998. The jurisdiction of this Court is invoked under the Departments of Commerce, Justice, and State, the Judiciary, and Related

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[1] References to the jurisdictional statement are cited as "*J.S.*"; references to the Joint Appendix in 98-404, *United States Department of Commerce, et al.* v. *United States House of Representatives, et al.*, are cited as "*App.*, 98-404."

Agencies Appropriations Act, 1998, Pub. L. No. 105-119, § 209(e)(1), 111 Stat. 2482. This Court noted probable jurisdiction on October 9, 1998.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. Article I, Section 2, Clause 3 of the United States Constitution is reproduced at *J.S.*24a.

2. Amendment V of the United States Constitution provides:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

3. Amendment XIV, Section 2 of the United States Constitution is reproduced at *J.S.*24a-25a.

4. Sections 141 and 195 of Title 13, United States Code, are reproduced at *J.S.*27a-30a.

STATEMENT OF THE CASE

National Korean American Service & Education Consortium, Inc. and the other Asian American and Latino organizations and individuals submitting this brief seek to protect their interests in ensuring that the nation's racial and ethnic minorities are counted equally with non-hispanic whites in the 2000 census.[2] These parties respectfully refer the Court to their brief filed as appellees in *United States Department of Commerce, et al.* v. *United States House of Representatives, et al.*, 98-404, on October 6, 1998, for a more complete statement of the facts underlying this case, which are briefly set forth below.

In the last census, the Census Bureau missed more than four million people overall, a disproportionate majority of whom were racial and ethnic minorities.[3] Sixty-nine percent of these people the Census Bureau failed to count were members of racial and ethnic minorities, even though members of these groups represent only about 25 percent of

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[2] These Asian American and Latino organizations and individuals are National Korean American Service & Education Consortium, Inc.; Organization of Chinese Americans, Inc.; Organization of Chinese Americans, Los Angeles, California Chapter; Search to Involve Pilipino Americans, Inc.; United Cambodian Community, Inc.; League of United Latin American Citizens; California League of United Latin American Citizens; National Association of Latino Elected and Appointed Officials, Inc.; Mothers of East Los Angeles; Hee-Sook Kim, a resident of New York; Adeline M.L. Yoong, a resident of California; Michael Balaoing, a resident of California; Sovann Tith, a resident of California; Johnny Rodriguez, a resident of Texas; Chayo Zaldivar, a resident of Texas; Gilberto Flores, a resident of California; and Alvin Parra, a resident of California.

[3] U.S. Census Bureau, *1990 Census of Population and Housing, Public Law 94-171 Data, Age By Race and Hispanic Origin* (visited Oct. 1, 1998) <http://tier2.census.gov/pl94171/PL94data.htm>.

the total population.[4] Notwithstanding the fact that the 1990 census was the most expensive and most exhaustive effort in history to employ traditional census methods, it was the first census known to be less accurate overall than its predecessor.[5]

Recognizing that the next census would fall five million short of an accurate count if traditional methods were used exclusively, and that racial and ethnic minorities would again be omitted disproportionately from the census count, the Secretary of Commerce decided to use statistical sampling in conjunction with more traditional census techniques in 2000.[6] Plaintiffs, however, seek in this suit to prevent the implementation of this solution, which is the only practicable solution that addresses the disproportionate undercounting of minorities.

Because racial and ethnic minorities are likely to be missed using traditional census methodologies, areas in which many minorities live will be disproportionately undercounted as compared to the rest of the nation. The people who live in those areas -- many or most of whom are the minorities who are likely to be uncounted -- will disproportionately bear the brunt of the effects of the undercount, including the dilution of their votes due to malapportioned political districts, the misallocation of congressional representation, and a diminished access to federal funding.

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[4] *Id.*

[5] U.S. DEP'T OF COMMERCE, BUREAU OF THE CENSUS, *Report to Congress — The Plan for Census 2000* (Aug. 1997), *App.*, 98-404 at 48.

[6] *Id., App.*, 98-404 at 99.

The injunction entered below will preserve the advantages of those communities that have been actually or relatively overcounted in the past at the expense of communities with substantial minority populations. Far from either adding "virtual persons" to the population count or subtracting persons who actually exist, as plaintiffs contended below, the proposed census methodology will scientifically account for those systematically missed and those double-counted pursuant to traditional survey methods, thereby producing a more accurate enumeration.

The lower court appears to have accepted as plain truth plaintiffs' inaccurate characterization of the workings of the census plan, even though defendants and intervenor-defendants disputed these purported "facts" in opposition to summary judgment. Defendants and intervenor-defendants explicitly disputed plaintiffs' erroneous assertion below that "[a]ctual persons counted will be deducted from the census population figures" if the proposed sampling methodology were used.[7] Intervenor-defendants also submitted evidence in opposition to summary judgment to show that the use of statistical sampling will lead to a more complete and accurate census than would traditional methods of enumeration.[8]

Furthermore, contrary to the district court's opinion, no community will suffer "vote dilution" if statistical sampling

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[7] *See* Defendants' Response to Plaintiffs' "Rule 10(f)(2)" Statement of Undisputed Material Facts, ¶ 29 (May 4, 1998); National Korean American Service & Education Consortium, Inc, *et al.*, Local Rule 56(b) Statement of Genuine Issues of Material Fact Submitted in Opposition to Plaintiffs' Motion for Summary Judgment, ¶ 29 (May 4, 1998).

[8] *See* Memorandum of Proposed Intervenor-Defendants National Korean American Service & Education Consortium, Inc., *et al.* in Opposition to Plaintiffs' Motion for Summary Judgment, Ex. 1, ¶ 10 (May 4, 1998).

is used in conducting the decennial census in 2000. *See J.S.*11a-12a. Instead, the plaintiffs' voting districts, as well as all others drawn on the basis of accurate census data, will at last comport with the principle of "one person, one vote." As there are neither statutory nor constitutional impediments to the use of statistical sampling for a more accurate enumeration of the population for purposes of apportionment, the injunction below should be vacated.

The Legal Underpinnings of the Decennial Census

The Constitution provides that Representatives shall be "apportioned among the several States . . . according to their respective Numbers." U.S. CONST. art. 1, § 2, cl. 3. Originally, these "Numbers" were to be determined not by including all members of society in a numerical assessment, but rather, "by adding to the whole Number of free Persons, . . . excluding Indians not taxed, three fifths of all other Persons." *Id.* The Census Clause then provides that "[t]he actual Enumeration [of the states' respective Numbers] shall be made within three Years after the first Meeting of the Congress of the United States, and within every subsequent Term of ten Years, in such Manner as [the Congress] shall by Law direct." *Id.* The Fourteenth Amendment subsequently recognized the status of former slaves as equal "persons" under the Constitution, and requires that the "respective Numbers" of the states for the purpose of apportionment include "the whole number of persons in each State, excluding Indians not taxed." U.S. CONST. amend. XIV.

Congress has delegated to the Secretary of Commerce the responsibility for taking each decennial census "in such form and content as he may determine, including the use of sampling procedures and special surveys." 13 U.S.C. § 141(a). Congress has also provided that sampling must be used whenever feasible, "[e]xcept for the determination of

population for purposes of apportionment of Representatives in Congress among the several States." 13 U.S.C. § 195. The statute does not say that sampling cannot be used for purposes of apportionment.

The Lawsuit and Proceedings Below

The plaintiffs filed suit to enjoin the use of the Census Bureau's plan to use statistical sampling in the 2000 census, asserting that the use of statistical sampling in determining the population for purposes of apportionment violates both the Census Act and Article I, Section 2, Clause 3 of the Constitution. The suit named William Jefferson Clinton, President of the United States; the United States Department of Commerce; William M. Daley, Secretary of the United States Department of Commerce; the Bureau of the Census; and James F. Holmes, Acting Director of the Bureau of the Census (collectively, the "government defendants") as defendants. National Korean American Service & Education Consortium, Inc. and the other individuals and organizations submitting this brief were one of four groups that intervened as defendants under Fed. R. Civ. P. 24.[9]

The government defendants and three intervenor-defendant groups moved to dismiss the complaint for lack of jurisdiction and failure to state a claim, and the plaintiffs moved for summary judgment. The district court denied the motions to dismiss, concluding that the case is ripe for judicial review, *J.S.*7a, and that the plaintiffs have standing, *J.S.*9a. The court also granted the motion for summary judgment, holding that the use of statistical sampling in

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[9] Although the issue of the party status of intervenors below appeared uncertain at the time the Jurisdictional Statement was filed, *see J.S.*II, the district court stated in an order dated October 15, 1998 that intervention had been granted at the time of oral argument below.

determining the population for purposes of apportionment would violate the Census Act. *J.S.*16a-17a.

Because it concluded that the Census Act prohibits the use of statistical sampling for purposes of apportionment, the district court found no need to reach the constitutional question presented. *J.S.*17a n.2, 21a.

SUMMARY OF THE ARGUMENT

1. The plain text of sections 141(a) and 195 together demonstrate Congress's intent to permit sampling for a number of purposes, including the purpose of apportionment of Representatives in Congress among the several states. In section 141(a), Congress provides that sampling procedures and special surveys are permissible ways in which to undertake a decennial census of population. Section 195 requires the Secretary to use sampling if he deems it feasible. The introductory clause of section 195, however, exempts sampling for apportionment purposes from the general requirement that sampling be used. Contrary to the holding of the court below, this exception from the mandatory language of the statute does not prohibit the Secretary from using sampling if he believes it appropriate to do so. The words of the statutory provisions speak for themselves, stating clearly that the Census Act allows the use of sampling in the apportionment process.

2. The Constitution does not prescribe a particular methodology by which to conduct the census for purposes of apportionment, but rather, indicates that the form of such census should not be given priority over its accuracy. The words of Article I alone explicitly give Congress the power to conduct the decennial enumeration of the population "in such Manner as they shall be Law direct." Moreover, both the language of Article I and the records of the Federal

Convention demonstrate that the Framers meant only to mandate that the numbers for apportionment be calculated decennially according to a formula that took into account the entire free population and three-fifths of the slave population. No evidence suggests that the Framers ever considered precisely what methodology should be used to determine the total population number to which that formula would be applied. Finally, the Census Clause of the Constitution must be interpreted in light of the subsequent ratification of the Fourteenth Amendment, requiring that former slaves be counted in the census equally with whites, and the constitutional goals of equal protection and equal representation. An interpretation of the Census Clause to require a methodology known to perpetuate a differential undercount of racial and ethnic minority populations would clearly be inconsistent with those constitutional principles.

ARGUMENT

I. THE DISTRICT COURT ERRED IN ITS INTERPRETATION OF THE CENSUS ACT

National Korean American Service and Education Consortium, Inc. and the other parties submitting this brief respectfully refer the Court to their brief filed as appellees in *United States Department of Commerce, et al.* v. *United States House of Representatives, et al.*, 98-404, on October 6, 1998 for a full discussion of the Census Act's clear grant of discretion to the Secretary of Commerce to use sampling in the decennial census for purposes of apportionment. An analysis of the district court's opinion is set forth below.

A. The District Court Gave Incomplete Consideration to the Provisions of Section 141

The district court erred in its "plain" reading of the Census Act, as that reading was based on a conclusory and erroneous decision that "the only plausible interpretation of the plain language and structure of the Act is that section 195 prohibits sampling for apportionment and Section 141 allows it for all other purposes." *J.S.*21a. The district court's interpretation of these two sections flies in the face of the language and the structure of the Act.

The lower court interpreted section 141 to be a provision that "generally authorizes the Secretary to use sampling in conducting various aspects of the census, without an express prohibition," and then concluded that "[a] reading of the plain language of Section 141 itself further establishes that Congress's intent was to authorize sampling for numerous purposes of the census other than congressional apportionment." *J.S.*18a. In deciding that the "plain" reading of the Census Act prohibits sampling for the purpose of congressional apportionment, however, the court disregarded both sections 141(a) and 141(b), citing without explanation only to section 141(g). *J.S.*18a. Section 141(g) merely states: "As used in this section, 'census of the population' means a census of a population, housing, and matters relating to population and housing." *J.S.*18a.

Read together, sections 141(a),(b), and (g) manifest the clear intent of Congress to give the Secretary the discretion to use sampling for a number of purposes, including the purpose of congressional apportionment. Even standing alone, section 141(a) expressly provides the Secretary with such discretion. *United States House of Representatives* v. *United States Department of Commerce*, 11 F. Supp. 2d 76, 103 (D.D.C. 1998) (stating that "section 141(a) . . . standing

alone appears to permit statistical sampling in congressional apportionment).

Section 141(a) of the Census Act states:

> The Secretary shall, in the year 1980 and every 10 years thereafter, take a decennial census of population as of the first day of April of such year, which date shall be known as the "decennial census date," in such form and content as he may determine, *including the use of sampling procedures and special surveys.*

13 U.S.C. § 141(a) (emphasis added). On its face, this provision clearly authorizes the use of sampling for the "decennial census of population," including for the purpose of apportionment. Furthermore, section 141(a) of the Census Act is the sole provision authorizing the Secretary to conduct the constitutionally required decennial census for congressional apportionment entrusted to Congress under Article I, Section 2, Clause 3. *See Wisconsin* v. *City of New* York, 517 U.S. 1, 19 (citing section 141(a) as the provision by which "Congress has delegated its broad authority over the census to the Secretary"). Thus, it is clear that the "decennial census of population" to be conducted pursuant to section 141(a) — which entails the use of sampling — is to be used for apportionment. *See* S. Rep. No. 94-1256, *reprinted in* 1976 U.S.C.C.A.N. 5463, 5467 (stating "[i]t is for the purpose of apportioning Representatives that the United States Constitution establishes a decennial census of population").

In addition, the plain text of Section 141(b) reinforces section 141(a)'s clear grant of authority to the Secretary to use sampling in conducting the decennial census for a number

of purposes, including for congressional apportionment. Indeed, section 141(b), which the court below failed to consider in its analysis, explicitly refers to congressional apportionment.

Section 141(b) states:

> The tabulation of total population by States *under subsection (a) of this section as required for the apportionment of Representatives in Congress* among the several States shall be completed within 9 months after the census date and reported by the Secretary to the President of the United States.

13 U.S.C. § 141(b) (emphasis added). Therefore, sections 141(a) and 141(b) clearly demonstrate that the statute authorizes the Secretary to use statistical sampling in conducting the decennial census for apportionment purposes.

The other subsections of section 141 further support this reading of the statute. Throughout section 141, a critical distinction is made between the "decennial" census — which is used for apportionment purposes — and the "mid-decade" census (which is not). Indeed, Congress carefully amended section 141 by inserting the terms "decennial" or "mid-decade" in order to indicate the difference between the two censuses and the different purposes for which they serve.[10]

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[10] The Senate Report clearly provides that the 1976 amendment to section 141 of the Census Act modified the subsections in order to differentiate between the "decennial" and "mid-decade" censuses. S. Rep. No. 94-1256, *reprinted in* 1976 U.S.C.C.A.N. 5463, 5466 (amending section 141 "by rewording subsections (a), (b), and (c) and (continued...)

Significantly, Congress specifically added subsection (e)(2) of section 141 to prohibit the use of mid-decade census data for the apportionment of the House. 13 U.S.C. § 141(e)(2); *see also* S. Rep. No. 94-1256, *reprinted in* 1976 U.S.C.C.A.N. 5463, 5467. No such limitation, however, was placed on the use of the *decennial* census data for the apportionment of the House. Moreover, section 141(g), on which the lower court relied without explanation, *J.S.* 18a, defines the term "census of population" generally as a "census of population, housing, and matters relating to population and housing." 13 U.S.C. § 141(g). This definition is consistent with section 141's broad grant of discretion to the Secretary to use sampling for a number of purposes, including the decennial census of population (used to apportion the House) and other matters relating to housing or population.

B. The Reasoning Underlying the District Court's Interpretation of Section 195 is Flawed

In addition to rendering an incomplete analysis of section 141, the lower court also incorrectly read section 195 of the Census Act to prohibit the use of sampling for purposes of apportionment. Section 195 states:

> Except for the determination of population for purposes of apportionment of Representatives in Congress among the

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[10] (...continued)
adding four new subsections. The new subsection (d) authorizes the mid-decade census of population") and at 5467 ("[o]ne clarification is made by inserting the word 'decennial' before the word 'census' in each instance where it appears in subsection (c). This amendment makes clear the intent of 141(c) to relate solely to decennial census tabulations for reapportionment or redistricting purposes.").

> several States, the Secretary shall, if he considers it feasible, authorize the use of the statistical method known as "sampling" in carrying out the provisions of this title.

13 U.S.C. § 195. Nothing in the language of this provision prohibits sampling for any purpose. Rather, this provision is intended to mandate its use, wherever feasible, in every context except apportionment. Only with respect to apportionment does the Secretary retain absolute discretion to use or not to use sampling.

Despite this more obvious reading of section 195 which would allow sampling for purposes of apportionment consistent with section 141, the lower court held that "[t]he 'except for' language [of section 195] . . . plainly imposes a restriction forbidding the sampling method in collecting numbers for apportionment." *J.S.*19a. The lower court referred to the opinions in *Richardson* v. *Ramirez*, 418 U.S. 24 (1974), and *Crosby* v. *United States*, 506 U.S. 255 (1993), in an attempt to find support for its conclusion that the words "except for" automatically operate as an affirmative prohibition of a particular action whenever they appear in a sentence that otherwise commands that action. *J.S.*19a. While both of the decisions dealt with "except" clauses, neither found that such clauses, in and of themselves, operated as express prohibitions.

In *Richardson*, this Court considered whether the state of California violated the Equal Protection Clause by disenfranchising convicted felons who completed the service of their sentences and paroles. 418 U.S. at 41-56. In considering the question, the Court briefly examined the

"except for" language in section 2 of the Fourteenth Amendment,[11] but did not address the separate issue of whether such language automatically acts as a restriction. 418 U.S. at 41-56. Despite the Court's silence on this issue, the lower court in the present case attempted to support its position by seizing on the language in *Richardson* that noted that disenfranchisement for conviction of a felony was a situation that "was expressly exempted" from section 2's penalty of reduced representation in the event a state disenfranchised a portion of its citizenry. *Id.* at 55. Apparently, the district court assumed that the Court arrived at such an interpretation by virtue of the "except for" clause in section 2. *J.S.*19a.

However, the mere fact that the "except for" language may create an exemption in the context of section 2 does not force the conclusion that such language necessarily operates as a restriction of any kind. In fact, the "except for" clause in section 2 of the Fourteenth Amendment effectively operates as a restriction only because the first sentence of the

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[11] Section 2 of the Fourteenth Amendment provides:

> Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed. But when the right to vote at any election . . . is denied to any of the male inhabitants of such State, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such State.

U.S. CONST. amend. XIV, § 2.

section commands an action ("representation *shall* be based on 'respective numbers'") that is inconsistent to that which is commanded in the second sentence ("representation *shall not* be based on 'respective numbers' in certain situations"). U.S. CONST. amend. XIV, § 2. Those situations falling within the scope of the exception set forth in the second sentence are governed by the previously stated rule on representation contained in the first sentence, which happens to require an inconsistent action. In contrast, the Census Act contains no inconsistent command with respect to sampling for any and all purposes. Like section 2, situations falling within the scope of the exception set forth in section 195 of the Census Act are governed by a previously stated rule. Yet unlike section 2, the previous rule of the Census Act, namely, section 141(a), is *consistent* with the rule in section 195, and permits sampling for a number of purposes, including congressional apportionment. To be sure, neither exception, as stated in section 2 of the Fourteenth Amendment or in section 195 of the Census Act, by itself prescribes or prohibits any particular action.

The district court's reliance on *Crosby* v. *United States* to support its interpretation of the language of section 195 is similarly misplaced. In *Crosby*, this Court considered whether Federal Rule of Criminal Procedure 43 permits the trial *in absentia* of a criminal defendant who absconds and is absent at the beginning of trial. 506 U.S. at 256. That rule provides in pertinent part:

> (a) PRESENCE REQUIRED. The defendant shall be present at the arraignment, at the time of the plea, at every stage of the trial including the impaneling of the jury and the return of the verdict, and at the imposition of the sentence, *except as otherwise provided by this rule*.

> (b) CONTINUED PRESENCE NOT REQUIRED. The further progress of the trial to and including the return of the verdict shall not be prevented and the defendant shall be considered to have waived the right to be present whenever a defendant, initially present,
>
> (1) is voluntarily absent after the trial has commenced . . . .

Fed. R. Crim. P. 43 (emphasis added). The Court held that Rule 43 prohibits the trial *in absentia* of a defendant who is not present at the beginning of trial, but stated that a trial could proceed *in absentia* of a defendant who is voluntarily absent after the trial has commenced. *Crosby*, 506 U.S. at 258-61. The district court in the present case interpreted *Crosby* to mean that the "except as otherwise provided" language of the rule constitutes "an express limitation of the circumstances where a defendant could permissibly be absent." *J.S.* 19a. However, that language was not, and could not be, found to limit the instances when a defendant could permissibly be *present*. *Crosby*, 506 U.S. at 259-61. After a defendant has left voluntarily following the beginning of trial, his presence is not necessary to the completion of the proceedings, but it is nonetheless permissible for him to be present as the trial continues. *Id.* Thus, the mandate in Rule 43 is for a defendant's presence at trial, but the exception to that mandate does not prohibit the defendant's presence in the exceptional situation. Similarly, the mandate in section 195 is to use sampling, and the exception to that mandate does not prohibit the use of sampling in the exceptional situation.

C. The District Court Erred in Its Application of the Rules of Statutory Interpretation

In reaching its conclusion that "[s]ection 141 in no way undermines the definite prohibition of sampling for purposes of apportionment contained in Section 195," *J.S.*21a, the district court also erred in its application of the rules of statutory interpretation. While it properly recognized that "'[i]t is the cardinal principle of statutory construction . . . to give effect, if possible, to every clause and word of a statute . . . rather than to emasculate an entire section,'" *J.S.*17a (citations omitted), the court violated this rule with a strained reading that ignores significant provisions of section 141. *See, e.g., Clark* v. *Uebersee Finanz-Korporation, A.G.*, 332 U.S. 480, 488-89 (1947) ("Our task is to give all of it [the entire statute] . . . the most harmonious, comprehensive meaning possible. . . . To do otherwise would be to impute to Congress a purpose to paralyze with one hand what it sought to promote with the other."). Section 141 plainly permits the use of sampling in the decennial census for congressional apportionment.

The lower court incorrectly asserted that "[r]eading the general authorization for sampling in Section 141 as somehow negating the prohibition of sampling in Section 195 would render the language of Section 195 meaningless." *J.S.*20a. The purpose of Section 195 is to limit the Secretary's discretion in using sampling for purposes other than apportionment, while allowing complete discretion under the statute to use sampling for purposes of apportionment. The "except for" language that the lower court found would be rendered "devoid of meaning" by such a reading, *J.S.*19a, still has a very precise meaning: that the limits on the Secretary's discretion set forth in section 195 do not apply to apportionment.

The court's opinion is also somewhat contradictory in its subsequent application of the rule of statutory interpretation which provides that the more specific section governs the general when two sections conflict. *J.S.*20a. The lower court claimed that section 141 did not authorize sampling for apportionment. *J.S.*21a. Yet, the lower court's decision to choose section 195 as the more specific provision, *J.S.*20a, necessarily assumes that section 141 is contrary to the lower court's "plain" reading of section 195, and therefore that section 141 does indeed permit sampling for apportionment purposes.

Based on the plain language and the rules of statutory interpretation, the two provisions should be read together to permit the use of statistical sampling for a variety of purposes, including the purpose of congressional apportionment. The plain text of section 141 alone manifests Congress's intent to authorize the Secretary to use "sampling procedures and special surveys" in conducting the "decennial census of population," the census to be used for congressional apportionment. Section 195's plain language reasonably must be read also to allow the use of sampling in the decennial census for purposes of apportionment.

II. THE CONSTITUTION DOES NOT PROHIBIT THE USE OF STATISTICAL SAMPLING IN ENUMERATING THE POPULATION FOR PURPOSES OF APPORTIONMENT

If the lower court erred in interpreting the Census Act to prohibit sampling, the question of whether the language of the Constitution precludes the use of statistical sampling in the 2000 census for purposes of apportionment must be considered.

The lower court stated that it was not considering the constitutional question presented by the plaintiffs, as it found the statutory question dispositive. *J.S.*17a n.2, *J.S.*21a. In dicta, however, the district court asserted without reasoning that "the plain language" of the Constitution in both Article I, section 2, clause 3 and the Fourteenth Amendment "mandates a head count of the population." *J.S.*17a n.2. National Korean American Service & Education Consortium and the other parties submitting this brief respectfully refer the Court to their brief filed as appellees in *United States Department of Commerce, et al.* v. *United States House of Representatives, et al.*, 98-404, on October 6, 1998 for a refutation of the district court's assertion and a full discussion of the constitutional issues in this case, which is summarized below.

Nothing in the Constitution prohibits the use of sampling for purposes of apportioning representatives. Neither the language nor the history of the Constitution offers any indication that the Framers intended either to require or to prohibit any particular procedure for determining the numbers of the entire population. The records of the Federal Convention, in fact, demonstrate that the words "actual Enumeration" in the Constitution mandated the act of calculating a total based on the formula set forth in Article I

that took into account the whole free population and three-fifths of the slave population, not a specific means by which to arrive at the total population number to which the formula would be applied.

With the ratification of the Fourteenth Amendment, the Constitution for the first time required that the former slaves be counted equally in the decennial "enumeration" for the purpose of apportioning representatives. Any reading of the words "actual Enumeration" that would require adherence to a methodology certain to result in less-than-equal counting, therefore, would undermine the fundamental principles of equality embodied in the Fourteenth Amendment.

Although various types of household surveys have historically been the mainstay of the decennial census, past history is not determinative of the limits of Congress's discretion as set forth in the Constitution, which directs Congress to take the census "in such Manner as they shall by Law direct." It does not preclude the use of newly developed methodologies that better account for the entire population. Furthermore, in light of the differential undercount of racial and ethnic minorities that will inevitably result if only traditional methods are used, considerations of equal representation and equal protection militate for the use of statistical sampling in the 2000 census.

CONCLUSION

The Court should reverse the district court and vacate the order enjoining the use of statistical sampling in the 2000 census for the purpose of apportioning Representatives among the states.

Respectfully submitted,

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